



The State of New Hampshire  
**Department of Environmental Services**



Michael P. Nolin  
Commissioner

Lost Cloud Forest Management, LLC  
Shaun Hathaway, Owner & Registered Agent  
585 Gilman Pond Road  
Newport, NH 03773

Re: Property of Barton & Elizabeth Green  
140 Maple Street, Andover, NH  
DES Wetlands File No. 2006-1066

**NOTICE OF PROPOSED  
ADMINISTRATIVE FINE  
NO. AF 06-038**

August 30, 2006

**I. INTRODUCTION**

This Notice of Proposed Administrative Fine is issued by the Department of Environmental Services, Water Division to Lost Cloud Forest Management, LLC, pursuant to RSA 482-A, 485-A and NH Admin. Rule Env-C 601. The Division is proposing that fines totaling **\$20,000** be imposed against Lost Cloud Forest Management, LLC for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

**II. PARTIES**

1. The Department of Environmental Services, Water Division ("the Division"), is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, New Hampshire.
2. Lost Cloud Forest Management, LLC ("Lost Cloud") is a New Hampshire limited liability company having a mailing address of 585 Gilman Pond Road, Newport, NH 03773.

**III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS**

1. Pursuant to RSA 485-A:17, the Department of Environmental Services ("DES") regulates significant alteration of terrain and erosion control through a permit program. Pursuant to RSA 485-A:6, VIII, the Commissioner of DES has adopted Env-Ws 415 to implement this program.
2. Pursuant to RSA 485-A:22, V, the Commissioner is authorized to impose administrative fines of up to \$2,000 per offense for violations of RSA 485-A:17, rules adopted under RSA 485-A:17, and permits issued under RSA 485-A:17. Pursuant to RSA 485-A:22, the Commissioner has adopted Env-C 603.02 to establish a schedule of fines for such violations.
3. Pursuant to RSA 482-A, DES regulates dredging, filling, and construction in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
4. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the

Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.

5. Pursuant to RSA 485-A:13 and related sections, DES regulates the discharge of pollutants to surface waters under a permit system. As part of this program, the Commissioner of DES has adopted Env-Ws 401 – 405 relating to permits and has adopted Env-Ws 1700 to establish water quality standards for the state's waters.

6. Pursuant to RSA 485-A:22, V, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations relating to this program. Pursuant to this section, the Commissioner has adopted Env-C 603 to establish the schedule of fines for such violations.

7. Barton and Elizabeth Green are the owners of land located on 140 Maple Street, more particularly described on Town of Andover Tax Map 17 as Lot 120 ("the Property").

8. On April 18, 2006, the Town of Andover signed the New Hampshire Department of Revenue *Notice of Intent to Cut Wood or Timber* for the Property. The Notice lists Lost Cloud Forest Management, LLC as the logger/forester responsible for cutting and for following applicable timber harvest laws. The Notice of Intent was signed by Shaun Hathaway on behalf of Lost Cloud.

**May 2006:**

9. On May 4, 2006, the Division received a report that brown, turbid water was flowing into Highland Lake from a tributary running under Maple Street in Andover, New Hampshire.

10. On May 4, 2006, Division personnel responded to the report by making an immediate site visit. DES personnel followed the source of the turbidity upstream and found that it originated from an on-going logging operation on the Property.

11. On May 4, 2006, Division personnel collected turbidity samples from the stream that is the tributary to Highland Lake. A background turbidity sample collected measured 20.8 nephelometric turbidity units ("NTUs"). A turbidity sample collected downstream of the Lost Cloud logging operation on the Property measured 272 NTUs.

12. On May 4, 2006, the New Hampshire Department of Resources and Economic Development, Division of Forests and Lands, ("DRED") issued an Official Notice to Lost Cloud. The DRED Notice required Lost Cloud to immediately cease and desist operations for a "...non-permitted stream crossing. Failure to comply with BMPs [best management practices] for soil erosion resulting in siltation entering a tributary to Highland Lake. Cease and desist use of crossing until it is permitted by DES and brought into compliance with BMPs."

13. On May 5, 2006, Shaun Hathaway left a voice mail message for Division personnel. The message from Mr. Hathaway stated that hay bales and silt fence had been installed within the intermittent stream in an attempt to control the turbidity. He further stated that his "subcontractors never should have been in that section," and that he was "horrified by what he saw." He also stated in the recorded message that this "was his job and his responsibility."

14. On May 8, 2006, Division personnel conducted an inspection of the property and observed

or found the following:

- a. A poled ford had been installed within an intermittent stream channel. The logs were sunk in mud and silt. Standing water, mud and silt extended for at least 50 feet in both directions, rendering the crossing useless and ineffective. A row of hay bales had been staked downstream of the crossing within the stream channel;
- b. Upstream of the first crossing, the skid trail was in the stream itself for a distance of at least 300 feet. Water was flowing down the skid trail until it was diverted into the original stream channel by some felled hemlocks;
- c. Further upstream, the skid trail eventually left the stream channel and rutted a forested wetland for at least 100 feet with ruts measuring 12 inches deep;
- d. DES personnel walked downstream from the poled ford to Highland Lake, a distance of approximately 1,600 feet. Water was flowing clear at the time of the inspection; however, sediment measuring 6 inches deep was observed within the stream channel; and
- e. No permits were observed posted at the landing. Division has no record that a wetlands permit was requested or approved for the Property.

15. On May 9, 2006, the Division received a *Notification of Forest Management or Timber Harvest Activities Having Minimum Wetlands Impact* for the Property ("the Notification"). The Notification listed Lost Cloud as the logger/forester responsible for the cutting and was signed by Elizabeth Green.

**June 2006:**

16. On June 13, 2006, the Division received a report that brown, turbid water was flowing into Highland Lake from Tilton Brook. DES personnel responded to the report and found that it originated from the same Lost Cloud logging operation, but in a different area of the Property.

17. On June 13, 2006, Division personnel collected turbidity samples from upstream from the Lost Cloud logging operation on the Property and at the point where Tilton Brook flows into Highland Lake. A background turbidity sample collected upstream of the logging operation measured .31 NTUs. The turbidity sample collected at the point where Tilton Brook flows into Highland Lake was measured to be 19.5 NTUs. The distance from the June logging impacts to Highland Lake is approximately one mile.

18. On June 13, 2006, DRED issued an Official Notice to Shaun Hathaway. This 2nd DRED Notice required Mr. Hathaway to "cease and desist for failure to comply with BMPs [best management practices] resulting in siltation leaving skid trails and entering Tilton Brook. Cease and desist use of skid trail on western property line until it is brought into compliance with BMPs."

19. On June 14, 2006, Division personnel conducted an inspection of the Property and observed or found the following:

- a. Three poled fords had been installed within intermittent stream channels. The poled fords had been overtopped with sediment and water. Sediment and water flowed out of the skid trails and into Tilton Brook;
- b. Water and sediment was observed running off the skid trails in three other locations. The sediment and water was observed flowing directly into two beaver ponds and associated scrub-shrub wetlands; and
- c. No erosion controls were observed on site.

20. On June 19, 2006, the Division received a preliminary sediment and erosion control plan from Mr. Hathaway, which DES approved on or about June 22, 2006.

21. On July 6, 2006, Division staff received a telephone call from Mr. Hathaway who stated that the skid trail had been stabilized and that the restoration should be complete on July 11, 2006.

**July 2006:**

22. On July 11, 2006, the Division again received several complaints that brown, turbid water was flowing into Highland Lake from the stream that was the subject of the May inspection.

23. On July 13, 2006, Division personnel collected turbidity samples from the stream just upstream of where it discharges into Highland Lake. The result was 39.4 NTUs.

24. On July 18, 2006, DES issued Administrative Order No. WD 06-033 ("the Order") to Lost Cloud. The Order required, among other things, that Lost Cloud retain a Certified Professional in Erosion and Sediment Control to prepare an erosion and sediment control plan for DES review and approval; and to implement the plan upon approval.

25. DES records indicate that Lost Cloud and/or Shaun Hathaway have committed previous, similar violations of timber harvesting best management practices. On July 8, 1998, the Division issued Notice of Proposed Fine and Hearing No. AF 98-34 seeking an administrative fine of \$9,500 for violations relating to improper best management practices ("BMPs"). Subsequently, on August 23, 1998, the Division issued Notice of Proposed Administrative Fine and Hearing No. AF 98-70 to Lost Cloud seeking an administrative fine of \$4,000 for failure to following appropriate timber harvesting BMPs. These two Administrative Fine cases were settled by one agreement calling for payment of \$9,000 in 12 equal installments in the amount of \$750 each. According to records maintained by DES, only one payment of \$750 was received. Notice of Proposed Fine and Hearing No. AF 99-028 was issued regarding violations set out in Wetlands File No. 1998-02396, although the proposed administrative fine was ultimately withdrawn.

26. The Division has received three separate complaints in 2006 concerning Lost Cloud's failure to follow timber harvesting best management practices and has issued Letters of Deficiency Nos. WET 06-014 and WET 06-033 to Lost Cloud and Shaun Hathaway citing wetlands violations.

#### IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES

##### May 2006 Violations Alleged:

1. Lost Cloud has violated RSA 485-A:13 and Env-Ws 1703.11 by causing turbidity to exceed the naturally occurring conditions of a Class B surface water by more than 10 NTUs in May 2006. For this violation, Env-C 603.08(c) specifies a fine of \$2,000.
2. Lost Cloud has violated RSA 482-A:3 by dredging approximately 300 linear feet of intermittent stream channel. For this violation, Env-C 614.05(c) specifies a fine of \$2,000.
3. Lost Cloud has violated RSA 482-A:3 by dredging an additional 100 linear feet of intermittent stream channel by failing to properly install and maintain a poled ford. For this violation, Env-C 614.04(c) specifies a fine of \$1,500.
4. Lost Cloud has violated RSA 482-A:3 by disturbing a minimum of 200 linear feet of intermittent stream channel downstream of the poled ford by allowing sediment to be deposited into the stream. For this violation, Env-C 614.05(2)(c) specifies a fine of \$2,000.
5. Lost Cloud has violated RSA 482-A:3 by dredging or rutting approximately 1,500 square feet of wetland without a permit. For this violation, Env-C 614.02(a)(1) specifies a fine of \$500.
6. Lost Cloud has violated Wt 304.05 by failing to comply with *Best Management Practices for Erosion Control on Timber Harvest Operations in New Hampshire*, specifically by:
  - a. Failing to plan, locate and flag skid trails, surface water and wetland crossings in advance, thereby minimizing crossings to wetlands and surface waters;
  - b. Failing to install a crossing device such as a corduroy or geotextile while crossing a forested wetland; and
  - c. Use of poled ford during periods of high flow.

For these violations, Env-C 614.06(f) specifies a fine of \$2,000 for each violation for a total of \$6,000.

##### June 2006 Violations Alleged:

7. Lost Cloud has violated RSA 485-A:13 and Env-Ws 1703.11 by causing turbidity to exceed the naturally occurring conditions of a Class B surface water by more than 10 NTUs in June 2006. For this violation, Env-C 603.08(c) specifies a fine of \$2,000.
8. Lost Cloud has violated Wt 304.05 by failing to comply with *Best Management Practices for Erosion Control on Timber Harvest Operations in New Hampshire*, specifically by use of poled ford during periods of high flow and failure to maintain poled fords after becoming overtopped with water. For these violations, Env-C 614.06(f) specifies a fine of \$2,000.
9. Lost Cloud has committed repeated violations of best management practices on the Property

and on other properties. For committing repeat violations on the same or different property, Env-C 614.06(b) authorizes a fine of \$2,000.

**The total fine being sought is \$20,000.**

#### **V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING**

**Pursuant to Env-C 601.06, Lost Cloud is required to respond to this notice. Please respond no later than October 5, 2006 using the enclosed colored form.**

1. If Lost Cloud would like to have a hearing, please have an authorized representative sign the appearance section of the colored form (upper portion), check the appropriate line requesting a **formal hearing** and return it to the DES Legal Unit, at the address noted on the form.
2. If Lost Cloud wishes to discuss the possibility of settling the case, please have an authorized representative sign the appearance form, check the appropriate line indicating a desire to **meet informally** and return it to the DES Legal Unit.
3. If Lost Cloud chooses to waive the hearing and pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.

Lost Cloud is not required to be represented by an attorney. If Lost Cloud chooses to be represented by an attorney, the attorney must file an appearance and comply with NH Admin. Rule Env-C 200.

#### **VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES**

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that the Respondent committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that the Respondent committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

\* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Respondent proves, by a preponderance of the evidence**, applies in this case:

1. The violation was a one-time or non-continuing violation, **and** the Respondent did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** the Respondent did not benefit financially, whether directly or indirectly, from the violation.

2. At the time the violation was committed, Respondent was making a good faith effort to comply with the requirement that was violated.
3. Respondent has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to the Respondent's case which was not known to the Division at the time the fine was proposed.


**\*\* Pursuant to Env-C 601.09(d) and (e), the fine shall be increased by 10% for each of six (6) possible aggravating circumstances listed therein that the Division proves, by a preponderance of the evidence, apply in this case; up to the maximum fine stated in the statute under which the Division is seeking the fine.**

\*\*\*\*\***IMPORTANT NOTICE**\*\*\*\*\*

**An administrative fine hearing is a formal hearing.** All hearings will be recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Lost Cloud committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Respondent's opportunity to present testimony and evidence that Respondent did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Respondent has any evidence, such as photographs, business records or other documents, that Respondent believes show that Respondent did not commit the violation(s) or that otherwise support Respondent's position, the Respondent should bring the evidence to the hearing. Respondent may also bring witnesses (other people) to the hearing to testify on Respondent's behalf.

\*\*\*\*\*

Information regarding this proposed fine may be made available to the public via the DES Web page ([www.des.nh.gov](http://www.des.nh.gov)). If any party has any questions about this matter, please contact the DES Legal Unit, at (603) 271-7509.

  
Harry T. Stewart, P.E., Director  
Water Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Michael J. Walls, DES Assistant Commissioner  
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB  
Public Information Officer, DES PIP Office  
Kerry D. Barnsley, Compliance Attorney, DES Legal Unit  
Linda Magoon, DES Wetlands Bureau  
Paul Currier, DES Watershed Bureau  
Andrew Chapman, DES Watershed Bureau  
Jody Connor, DES Biology Bureau  
Doug Miner, DRED, Division of Forests and Lands

cc: Gretchen Hamel, Administrator, DES Legal Unit  
NH Association of Conservation Commissions  
Town of Andover Board of Selectmen and Conservation Commission



**\*\*\* RETURN THIS PAGE ONLY \*\*\***

**LOST CLOUD FOREST MANAGEMENT, LLC IS REQUIRED BY LAW  
TO RESPOND TO THIS NOTICE.**

**PLEASE RESPOND NO LATER THAN October 5, 2006**

Please check the appropriate line and fill in the requested information below.

**APPEARANCE** On behalf of Lost Cloud Forest Management, LLC:

\_\_\_\_\_ I request to have a **formal hearing** scheduled in this matter.

\_\_\_\_\_ I would like to **meet informally** to discuss the issues in this matter.

**WAIVER OF HEARING** On behalf of Lost Cloud Forest Management, LLC:

\_\_\_\_\_ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$20,000 paid to "Treasurer, State of New Hampshire" is enclosed.\*

*\* If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

**Pursuant to Env-C 203.05 please provide the following information:**

\_\_\_\_\_  
Signature Date

Name (please print or type): \_\_\_\_\_

Title: \_\_\_\_\_

Phone: \_\_\_\_\_

**RETURN THIS PAGE ONLY AND ANY PAYMENT TO:**

**DES Legal Unit**

**Attn: Michael Sclafani, Legal Assistant**

**P.O. Box 95**

**Concord, NH 03302-0095**

---

# ENVIRONMENTAL Fact Sheet

---



29 Hazen Drive, Concord, New Hampshire 03301 • [603] 271-3503 • [www.des.nh.gov](http://www.des.nh.gov)

---

CO-2

2002

## Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

*This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.*

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.